

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JESSE L. HALL,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

ORDER

10-cv-239-bbc

In this proposed civil action for monetary relief brought pursuant to Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, plaintiff Jesse Hall contends that employees of defendant United States of America acted negligently in providing him medical treatment in violation of state law and exhibited deliberate indifference to his serious medical needs in violation of the Eighth Amendment. Specifically, plaintiff alleges that staff at the Federal Correctional Institution in Forrest City, Arkansas failed to properly diagnose and treat his stomach cancer. Plaintiff is proceeding under the in forma pauperis statute, 28 U.S.C. § 1915, and has made an initial partial payment of his filing fee.

On August 1, 2010, I dismissed plaintiff's original complaint for failure to comply

with Fed. R. Civ. P. 8, because it lacked information about plaintiff's medical care and the particular federal employees who plaintiff contends were responsible for the negligent acts and constitutional violations. I gave plaintiff an opportunity to amend his complaint and provide such information. Plaintiff has filed an amended complaint.

Because plaintiff is a prisoner, I am required by the 1996 Prison Litigation Reform Act to screen his amended complaint and dismiss any portion that is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. § 1915A. In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972). After reviewing plaintiff's amended complaint, I conclude that plaintiff may proceed on his claim under the Federal Tort Claims Act that MLP Azumah committed medical negligence by failing to diagnose and treat plaintiff's stomach cancer. However, plaintiff may not proceed on his claim under the Eighth Amendment at this time, because he has failed to name an appropriate defendant for this claim. I will give plaintiff an opportunity to amend his complaint and name an individual defendant for this claim.

In his amended complaint, plaintiff alleges the following facts.

ALLEGATIONS OF FACT

At times relevant to this complaint, plaintiff Jesse Hall was incarcerated at the Federal Correctional Institution in Forrest City, Arkansas. In August 2006, plaintiff began experiencing severe stomach pain and blood in his stool. Plaintiff complained to prison staff, including “MLP” Azumah, about his symptoms from August 2006 to early 2007. Azumah prescribed Zantac for plaintiff’s complaints. On December 19, 2006, plaintiff told Azumah that he could not handle the pain in his stomach. Azumah changed plaintiff’s medication to Rantidine. On January 4, 2007, plaintiff complained to nurse Tonya Miller about his pain. She increased his dosage of Rantidine to four times a day. On January 23, 2007, plaintiff complained again to Azumah about his pain and blood in his stool. Azumah made a diagnosis of gastroesophageal reflux disease and gave plaintiff Mylanta, an over-the-counter medication. Azumah did not conduct a blood test or any other test and did not consult a medical doctor when making this diagnosis.

On January 25, 2007, plaintiff went to medical staff for help, but his pain was so unbearable that he could not wait to be seen and returned to his dorm to lie down. He returned to the medical center on January 30, 2007, with complaints of severe bleeding and pain and asked Azumah to change his medication. Without consulting a doctor or conducting any tests, Azumah discontinued Mylanta and put plaintiff back on Rantidine.

Throughout February 2007, plaintiff continued to complain to staff about severe pain

and bleeding. On approximately March 13, 2007, MLP Refendor gave plaintiff a blood test. On May 4, 2007, an outside consultation was ordered and plaintiff was transferred to a hospital on an emergency basis to receive treatment for gastrointestinal bleeding. On May 5, 2007, doctors made a diagnosis of squamous cell carcinoma in plaintiff's stomach. Approximately ten days later, plaintiff underwent a surgical procedure for a sub-total gastroectomy in which a substantial portion of his stomach was removed. He has suffered permanent injury and disfigurement.

In May 2009, plaintiff filed an administrative claim with the "appropriate" federal agency regarding his medical treatment. The agency never responded to the claim.

DISCUSSION

A. Federal Tort Claims Act

The Federal Tort Claims Act (FTCA) provides a remedy for an individual seeking recovery for damages caused by the negligent or wrongful act of an employee of the federal government. 28 U.S.C. §§ 2671-2680. The coverage of the Act extends to federal prisoners, who may sue for injuries caused by the negligence of prison employees. United States v. Muniz, 374 U.S. 150, 150 (1963). The United States is the proper defendant in a claim brought under the FTCA, 28 U.S.C. § 2679(b)(1); Jackson v. Kotter, 541 F.3d 688, 693 (7th Cir. 2008).

Because a claim brought under the FTCA is governed by “the law of the place where the act or omission occurred,” the substantive law of Arkansas governs plaintiff’s claim for medical negligence. 28 U.S.C. § 1346(b); Gil v. Reed, 381 F.3d 649, 658 (7th Cir. 2004); Campbell v. United States, 904 F.2d 1188, 1191 (7th Cir. 1990). Claims involving a medical care provider’s failure to properly diagnose and treat medical needs, such as plaintiff’s claim, fall under Arkansas’s Medical Malpractice Act, Ark. Code. Ann. §§ 16-114-201 through 209 (1987). In order to sustain a claim for medical negligence under the Act, a plaintiff must allege “the applicable standard of care, the defendant’s breach thereof, and that the defendant’s breach proximately caused injury.” Jones v. McGraw, 288 S.W.3d 623, 626 (2008) (citations omitted); Dodd v. Sparks Regional Medical Center, 204 S.W.3d 579, 583 (2005).

Plaintiff’s allegations are sufficient to state a claim for medical negligence. He alleges that the medical staff at the Federal Correctional Institution in Forrest City, Arkansas, and MLP Azumah in particular, were negligent for failing to recognize that he had serious medical needs and failing to provide proper treatment for those needs. He alleges that Azumah was aware that he had severe stomach pain and blood in his stool for several months, yet failed to conduct any tests, consult any doctors or provide plaintiff any effective treatment for his condition. Plaintiff alleges that Azumah’s negligence caused his stomach cancer to go undiagnosed and untreated, resulting in serious pain, permanent injury and

disfigurement and a shortened life expectancy. From these allegations, it can be inferred that Azumah breached the applicable standard of care and caused plaintiff to suffer injuries.

B. Eighth Amendment Claim

Plaintiff also contends that defendant violated his rights under the Eighth Amendment by exhibiting deliberate indifference to his serious medical needs. Snipes v. DeTella, 95 F.3d 586, 590 (7th Cir. 1996); Estelle v. Gamble, 429 U.S. 97, 103 (1976). To state an Eighth Amendment medical care claim, a prisoner must allege facts from which it can be inferred that he had a “serious medical need” and that prison officials were “deliberately indifferent” to this need. Estelle, 429 U.S. at 104; Gutierrez v. Peters, 111 F.3d 1364, 1369 (7th Cir. 1997). Plaintiff alleges that he had severe stomach pain and blood in his stool. This is sufficient to allege a serious medical need. In addition, plaintiff alleges that MLP Azumah was aware of plaintiff’s severe pain and bleeding but failed to take reasonable measures to address it.

However, plaintiff has not named Azumah as a defendant for his Eighth Amendment claim. Instead, he names only the United States of America. In the previous order, dkt. #8, I explained to plaintiff that although the United States is the only proper defendant in a claim brought the FTCA, claims brought pursuant to Bivens, 403 U.S. 388, must be brought against the individuals who are personally responsible for the constitutional violation.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009). I instructed plaintiff to identify the particular people who knew that he needed medical treatment and who failed to take reasonable measures to provide the necessary treatment, and I directed plaintiff to add those people to the caption of his complaint. Although plaintiff identifies Azumah in his amended complaint, he did not add him as a defendant in the caption of the complaint. Thus, it is unclear whether plaintiff wishes to proceed against Azumah as a defendant. If plaintiff wishes to proceed on his claim under the Eighth Amendment, he should file an amended complaint that names either Azumah or another defendant (or defendants) in the caption of his complaint. Plaintiff may have until September 6, 2010, to do so. If plaintiff does not file an amended complaint by September 6, 2010, I will dismiss plaintiff's claim under the Eighth Amendment and this case will proceed only on plaintiff's claim under the FTCA.

As a final note, I caution plaintiff to think carefully about the possible consequences of pursuing both FTCA and Bivens claims. In particular, plaintiff should be aware that a judgment in the FTCA action would act as a complete bar to any action by plaintiff concerning the same subject matter against the employee of the government whose actions gave rise to the FTCA claim. 28 U.S.C. § 2676. In other words, if judgment is entered on plaintiff's FTCA claim concerning Azumah's failure to diagnose and treat plaintiff's medical needs, he may not pursue a constitutional tort claim under Bivens against Azumah arising from the same set of facts. Manning v. United States, 546 F.3d 430, 431 (7th Cir. 2008).

Moreover, even if plaintiff wins his Bivens claim against Azumah and judgment is entered in plaintiff's favor, the judgment would be vacated if plaintiff lost his FTCA claim later. For example, in Manning, 546 F.3d 430, the plaintiff pursued a Bivens claim against federal agents and an FTCA claim against the United States for malicious prosecution and intentional infliction of emotional distress. Id. at 431-32. After a jury entered a verdict for \$6.5 million in the plaintiff's favor on his Bivens claims, the court entered judgment for the United States on the FTCA claim. Id. at 432. The Court of Appeals for the Seventh Circuit held that the court's judgment in the FTCA claim triggered the FTCA bar under § 2676 and required that the Bivens judgment be vacated. Id. at 438. Thus, plaintiff should keep these rules in mind when deciding whether he wishes to pursue both an FTCA claim against the United States and an Eighth Amendment claim against Azumah or some other defendant.

ORDER

IT IS ORDERED that

1. Plaintiff Jesse Hall is GRANTED leave to proceed on his claim under the Federal Tort Claims Act that MLP Azumah failed to diagnose and treat plaintiff's stomach cancer.
2. Plaintiff may have until September 6, 2010, in which to submit an amended complaint that identifies an appropriate defendant for plaintiff's claim of inadequate medical care under the Eighth Amendment. If plaintiff does not submit an amended complaint by

September 6, 2010, his claim under the Eighth Amendment will be dismissed.

3. Service of the complaint on defendant United States of America is STAYED until I have determined whether plaintiff may proceed on an Eighth Amendment claim.

Entered this 26th day of August, 2010.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge